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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

—against—

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

Appellee.

BRIEF OF APPELLEE.

JAMES S. BROWN, JR.,
Counsel for Appellee,
66 Court Street,
Brooklyn, N. Y.

ANTHONY F. TUOZZO,
WILLIAM GILLIGAN,
Of Counsel for Appellee.

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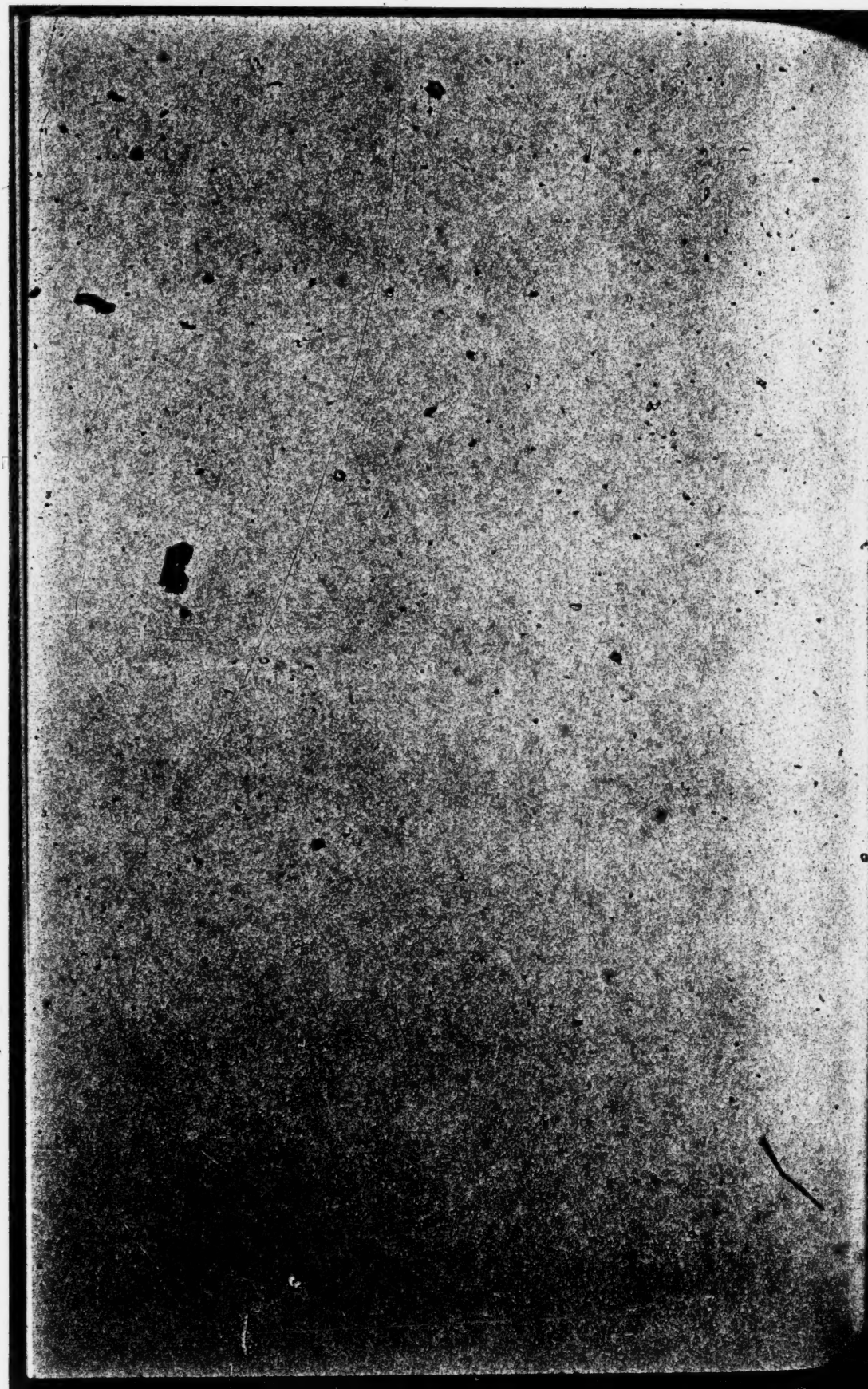

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Appellee.

BRIEF OF APPELLEE.

Jurisdiction.

The appellee heretofore duly filed with this Court a statement against its jurisdiction and a motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Supreme Court of New York from which the appeal was taken. Upon consideration, the Court entered the following order on November 9th, 1936:

> "Further consideration of the question of jurisdiction of this Court in this case and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

That motion was made, and is now renewed, upon the following grounds:

1. The decision of the Federal question now raised on this appeal was not necessary or essential to the determination of the cause;

2. The Federal question now raised, although presented in the appellate State Court, was not timely and was not duly presented and is not timely or duly presented here;

3. The decision of the New York Supreme Court on the question raised is in express harmony with the uniform decisions of this Court.

Opinions of Courts Below.

There were no reported opinions in the Courts below. The original judgment was entered in the Supreme Court of the State of New York, Kings County, on an order granting the appellee's motion to dismiss the appellant's amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action. That Court, at Special Term, thereupon rendered the following memorandum decision:

> "Motion by defendant to dismiss the amended complaint is granted. The Mortgage Moratorium Laws apply to the facts alleged in said complaint."

That judgment was unanimously affirmed without opinion by the Appellate Division of said Supreme Court (memorandum decision reported at 246 App. Div. 781 and 285 N. Y. S. 527) and then it was unanimously affirmed without opinion by the Court of Appeals of the State of New York, the highest Court of that State (memorandum decision reported at 271 N. Y. S. 564 and 3 N. E. (2nd) 186). The remittitur of that Court was then, on motion of the appellant, amended as provided on page 3 of the appellant's brief.

Statement of the Case.

In the short statement of the facts set forth at the beginning of the appellant's brief, there are omissions of certain facts which the appellee deems necessary and

pertinent to the points which he makes in this brief and he, therefore, sets them forth below in more detail to insure accuracy and clarity.

The facts are as follows:

On January 10, 1907, the John H. Hanan Realty Company made a bond and mortgage for $118,000 to certain third parties, which mortgage covered real property owned by said corporation on the southeast corner of Bleecker and Elizabeth Streets, Manhattan, New York City. John H. Hanan, individually, also executed the bond (Plaintiff's Amended Complaint, paragraphs I and II, R. 9). That bond and mortgage were some years thereafter assigned to said John H. Hanan, individually.

On August 9, 1920, said bond and mortgage were assigned by said John H. Hanan to the appellant's General Guardians. At the same time, an extension of mortgage showing a balance due thereon of $60,000, was also executed between the parties. Simultaneously this appellee's testator, Herbert W. Hanan, and one Addison G. Hanan and said John H. Hanan, executed the collateral bond for $60,000 now involved in this action.

The appellant persistently contends that this bond was an independent undertaking secured by the bond and mortgage (R. 10, and Appellant's Brief, pp. 6-10), whereas by its express terms it is an ordinary collateral bond made as a guaranty of the aforementioned original bond and mortgage. The State Courts, by their consistent affirmances, have decided it is a collateral bond.

Thereafter the said bond and mortgage and said collateral bond were assigned to the appellant (R. 10 and 11).

The said John H. Hanan died in 1920, and Addison

G. Hanan died in 1923. Herbert W. Hanan died July 21, 1933.

On August 26, 1933, and August 28, 1933, there became laws in the State of New York Chapters 793 and 794 of the Laws of 1933, commonly referred to as the "Mortgage Moratorium Laws".

Although the appellant raises no question as to the constitutionality of Chapter 793 and questions only Chapter 794 (Appellant's Brief, p. 22), it is nevertheless necessary for this Court to know what is provided in Chapter 793 in order to determine the reasonableness of the legislation. Chapter 793 is therefore set forth in the appendix to this brief.

Chapter 794, which became effective two days after Chapter 793, is set forth in the Appendix to appellant's brief.

On September 22, 1933, which was less than one month after these Mortgage Moratorium Laws took effect, the appellant, after taxes and interest on the mortgaged premises were in default, instituted an action in the New York Supreme Court, *New York* County, to foreclose the aforementioned mortgage in which she demanded a deficiency judgment against the said John H. Hanan Realty Company and the Estate of Herbert W. Hanan, deceased, the appellee.

The appellee interposed an answer in that action which consisted of denials and affirmative defenses. The appellant then made a motion for summary judgment against the John H. Hanan Realty Company and the appellee, which motion was denied as to the appellee but granted as to the said John H. Hanan Realty Company.

A judgment of foreclosure was shortly thereafter entered by the appellant without her attempting to bring on for trial and having adjudicated the issues raised by the appellee's said answer. The said judg-

ment followed the procedure outlined in said Chapter 794, and provided in part:

> "Ordered, Adjudged and Decreed that the plaintiff may apply at the foot of the judgment, after sale thereunder pursuant to Section 1083-a of the Civil Practice Act (as inserted therein by Chapter 794 of Sessions Laws of the State of New York for the year 1933) for judgment thereon against the defendant John H. Hanan Realty Corporation for such deficiency, if any, as the Court shall deem the plaintiff entitled to."

The mortgaged property was sold to the appellant on March 2, 1934, on the first and only bid of $10,000.

She subsequently moved, pursuant to said Chapter 794, the constitutionality of which she now questions, for a deficiency judgment against the said John H. Hanan Realty Company, which motion was referred to Hon. James A. O'Gorman, Official Referee, who, after hearing oral testimony and proofs, rendered a report, as follows:

> "The mortgaged premises consist of an approximately rectangular plot situated at the southeast corner of Bleecker and Elizabeth Streets, measuring 63′ 7½″ on Bleecker Street and 90′ on Elizabeth Street, improved with a seven story and basement brick loft and manufacturing building. The building is of semi-fireproof substantial construction with a floor carrying capacity of from 150 to 175 pounds to the square foot, it is equipped with a sprinkler system throughout, an elevator, and a plant for supplying steam heat which was originally designed also to supply live steam. The building is suitable for a variety of industrial uses and is situated in proximity to a large and cheap labor market. The mortgage under foreclosure for the principal amount of $60,000 was made in 1919,

through the reduction in amount and assignment of an earlier mortgage, and the assessed valuation of the property for purposes of taxation in 1919 was $97,000. The plaintiff's expert witness, Brown, testified that in his opinion the fair and reasonable value of the building in such market as existed on March 2, 1934, the date of the sale, was $45,000, but on cross-examination he admitted that he knew of no sales in the vicinity of the property for several years and stated that the last ready market for property in that vicinity was sometime previous to 1929. In making this appraisal of $45,000, the witness, Brown, attributed $33,000 to the value of the land, and $12,000 to the value of the building; he further testified that at the present time in his opinion the building had a rental value of about $13,000 per year and that the estimated cost of operating the building was approximately $9,000 per year; in his estimated cost of operating the building at the present time, he included an item for fire insurance of such an amount as to represent insurance on the building for $100,000. The defendant's witness, Douglas, testified that at the time of the hearing the plaintiff had the building insured for $125,000. The defendant's expert witness, Rinn, testified that on March 2, 1934, no market existed in which the mortgaged property could be sold, that such a market had not existed since the early part of 1930, and that in his opinion the fair and reasonable value of the property as of the date of the sale or such nearest earlier date as there was any market value thereof, was $87,000, of which $45,000 was attributed to the land and $42,000 was attributed to the building. The assessed valuation of the property for the year 1934 was $85,000, for 1933, $90,000, for 1932, $117,000, for 1931, $122,000, 1930, $132,000 and for 1929, $135,000. The average annual net rental, after deducting taxes and operating expenses for the five years ending January 31, 1929, was $9,332.35.

> In my opinion the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there was any market value thereof, was $70,000."

This valuation of $70,000 exceeded the amount due under the judgment of foreclosure and sale. In confirming the Referee's report the Court denied any deficiency judgment. From this determination no appeal was taken by the appellant.

The following year, on March 20, 1935, the said foreclosure action was discontinued as against this appellee.

Although all of the foregoing details of the steps taken in the foreclosure action are not part of the record, the appellee believes that the allegations in the appellant's amended complaint (R. 11) wherein she refers to said action and the sale thereunder, and expressly alleges that she "duly" made a motion for a deficiency judgment therein, are sufficiently broad to permit of the foregoing more detailed references to the record of said foreclosure action.

In May, 1935, this action at bar, which is a separate and distinct action, was commenced in the New York Supreme Court, *Kings* County, against the appellee alone on the aforementioned collateral bond. The appellant sued herein for $57,969.34, plus interest from March 7, 1934, that being made up of the amount due on her mortgage, plus taxes and interest to the date of confirmation of the sale and plus foreclosure costs, less the $10,000 at which she bid in the property on the foreclosure sale and less the net rents collected by the receiver.

The complaint was thereafter amended and the appellee duly moved to dismiss the same on the ground that it did not state facts sufficient to constitute a cause of action. This motion, in effect a demurrer, was granted.

Summary of Appellee's Argument.

POINT I. The decision of the federal question now raised was not necessary or essential to the determination of the cause, and this Court should refuse jurisdiction and dismiss the appeal.

The amended complaint was dismissed, the Court holding that the Mortgage Moratorium laws applied (R. 15). It was dismissable under Chapter 794 by reason of this chapter having operated to release the mortgagor from a deficiency in the prior action to foreclose a mortgage.

It was also dismissable under the entirely separate and distinct Section 1078 of the Civil Practice Act, which was *not* part of the Mortgage Mortaorium Laws but had been a State Statute for many years, having been one of the Revised Statutes and a section of the Code of Civil Procedure long before it was incorporated into the Civil Practice Act. That section provided that before instituting an action such as the one at bar the appellant had to procure leave of the Court and the amended complaint fails to show such leave was procured.

POINT II. The federal question now urged by the appellant is not properly or timely urged, and this Court should refuse jurisdiction and dismiss the appeal.

The appellant as plaintiff in the foreclosure action had made the appellee a party defendant therein and asked for a deficiency judgment against him; she pursued all the advantages of the remedies afforded by this same Chapter 794 which she is now attacking and never questioned its constitutionality. Instead of attacking the constitutionality of the statute when she had the

right to do so, the appellant not only elected to proceed with her foreclosure during that short emergency period from August 26, 1933 to July 1, 1934, but in the judgment which she caused to be entered, expressly adopted Chapter 794, reserved her rights thereunder and willingly submitted to the procedure prescribed thereby by applying for a deficiency judgment pursuant thereto. By doing so she precluded the mortgagor from presenting on appeal the equitable defenses pleaded in its answer, and after she had procured the appointment of an Official Referee to determine the deficiency she willingly submitted her proofs before him, but she herself did not appeal when a deficiency was denied her. Evidently as an afterthought, a year later she proceeded with this second suit against the appellee on a theory calculated to defeat the deficiency judgment statute.

POINT III. The decision of the State Court on the question raised is in express harmony with the uniform decisions of this Court.

The appellee refers particularly to the decision of this Court in *Home Savings and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, sustaining the constitutionality of a similar Statute of Minnesota, and to the "rent cases", viz,— *Block* v. *Hirsch*, 256 U. S. 135; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170, and *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242.

POINT IV. Chapter 794 of the laws of 1933 of the State of New York is constitutional.

An emergency existed; the Legislation is within the police power of the State; it is addressed to a legitimate end, is appropriate, reasonable and only temporary. It is remedial in effect and does not impair the obligations of a contract.

POINT V. The instrument sued upon is very obviously a collateral bond and not a primary obligation as claimed by appellant.

The recitals and conditions of the bond itself ("Exhibit A", R. 12-15), which was on a printed form of a "Collateral Bond" readily shows this. It embodies no recital that the obligors were indebted to the obligees and recites that it was given as "further and additional security". The appellant and her attorney referred to this bond in the foreclosure action as the "Collateral Bond", but now endeavors to claim it was otherwise.

Argument.

POINT I.

The decision of the federal question now raised was not necessary or essential to the determination of the cause.

"If the challenged decision of a state court rests upon independent grounds not involving a Federal question and broad enough to maintain the judgment, the Supreme Court will dismiss an appeal from the state court without considering any federal question that also may have been presented" (Hughes Federal Practice, Sec. 3227).

People ex rel Doyle v. *Atwell,* 261 U. S. 590;
Eustis v. *Bolles,* 150 U. S. 361;
Dibble v. *Bellingham,* 163 U. S. 63;
Adams v. *Russell,* 229 U. S. 353, 358;
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Richardson v. *Scott,* 276 U. S. 128;
Murdock v. *Memphis,* 20 Wall 590;
Chouteau v. *Gibson,* 111 U. S. 200.

And that has been the attitude of this Court even where the State Court has made a certification such as was

done in this case by the aforementioned amendment to the remittitur of the New York Court of Appeals.

Powell v. *Brunswick County*, 150 U. S. 433;
Parmelee v. *Lawrence*, 11 Wall (78 U. S.) (1870) 36;
Brown v. *Atwell*, 92 U. S. 327;
Adams County v. *Burlington*, 112 U. S. 123.

Regardless of the applicability of Chapter 794, the said amended complaint *was still dismissable* because of the provisions of Section 1078 of the Civil Practice Act, which is entirely separate and apart from the Mortgage Moratorium Laws and which provides:

> "ACTION FOR MORTGAGE DEBT SUBSEQUENT TO BEGINNING FORECLOSURE. While an action to foreclose a mortgage upon real property is pending *or after final judgment for the plaintiff therein*, no other action shall be commenced or maintained *to recover any part of the mortgage debt*, without leave of the court in which the former action was brought." (Italics supplied.)

There had been a final judgment in the foreclosure action, and this second action was commenced to recover part of the mortgage debt but the appellant's amended complaint contains no allegation that such leave of the court was procured, because, as a matter of fact, it has never been procured.

Such leave is part of the cause of action and must therefore be alleged, otherwise the complaint is demurrable (*Scofield* v. *Doscher* and *Robert* v. *Kidansky*, p. 12 *infra*, and *Farish* v. *Austin*, 25 Hun 430, *Freeman* v. *Dutcher*, 155 Abb. N. C. 431 and *Smith* v. *Britton*, 45 How. Pr. 428).

Leave to sue under this section is granted only in extraordinary and exceptional circumstances.

Matter of Byrne, 81 App. Div. 74;

United States Life Insurance Co. v. *Poillon,* 7 N. Y. Supp. 834;
Carlin v. *Lindtveit,* 175 App. Div. 940;
Hochstein v. *Schlanger,* 150 App. Div. 124, affd. 208 N. Y. 513.

The section applies to guarantees of payment of mortgages. *McKernan* v. *Robinson,* 84 N. Y. 105.

The purpose of the provision was to dispose of the entire proceeding in one action so as to avoid a multiplicity of suits.

Robert v. *Kidansky,* 111 App. Div. 475;
Equitable Life Assurance Society v. *Stevens,* 63 N. Y. 341;
Scofield v. *Doscher,* 72 N. Y. 491;
Stehl v. *Uris,* 210 App. Div. 445;
Darmstadt v. *Manson,* 144 App. Div. 249.

In *Stehl* v. *Uris* (*supra*) at page 449 the Court said:

> "Applications of this kind are necessarily addressed to the sound discretion of the court. *If the circumstances are of a character that render it inequitable to allow the deficiency judgment to be enforced,* then the court, being governed by principles of equity in granting or refusing such an application, should deny the same." (Italics ours.)

At the time of the entry of judgment of foreclosure and sale the appellee was a party to the action. The complaint demanded a deficiency judgment against him but as the action was still at issue as against him when the appellant entered her judgment of foreclosure, the said judgment made no provision for a deficiency judgment against him. The appellee was therefore released. *Tousey* v. *Barber,* 132 Misc. 861 (1928).

In this *Tousey* case one Isgar assumed payment of a mortgage. He was made a party defendant and a deficiency judgment demanded against him. The judg-

ment of foreclosure and sale did not provide for a deficiency against him. The sale was had pursuant to the judgment. A deficiency resulted. The referee certified that the defendant Isgar was liable therefor under said judgment and a judgment was entered against him. On motion to set aside the judgment and a counter motion to amend the judgment the Court said (at p. 863):

> "When the Barbers sold the mortgaged premises to the Isgars, and the latter promised and agreed to pay the mortgage and bond in question, the purchasers became, as between the parties, the principal debtors, and the sellers became the sureties. (*Paine* v. *Jones*, 76 N. Y. 274; *Calvo* v. *Davies*, 73 id. 211; *Wagoner* v. *Brady*, 221 App. Div. 405; *Hyde* v. *Miller*, 45 id. 396; *Dussault* v. *Wellman*, 130 Misc. 614.) That relationship survived the entry of this judgment. (*Wagoner* v. *Brady*, 221 App. Div. 405.)
>
> It is elementary that the liability of a surety ends with the extinguishment of the obligation of the principal. I think that the failure of the interlocutory decree to provide for a deficiency judgment against the Isgars, under all the circumstances disclosed here, amounts to an extinction of their debt.
>
> That judgment fixed the rights of the parties. All that remained to be done was to determine the amount of the deficiency for which the parties named therein, the sureties and not the principal, were to be liable. (*French* v. *French*, 107 App. Div. 107; appeal dismissed, 185 N. Y. 532.)
>
> The plaintiff could not have commenced or maintained another action against the Isgars to recover any part of the mortgage debt without leave of the court. (Civ. Prac. Act, §1078.)
>
> Such permission does not follow as a matter of course. Whether it should be granted or refused

depends entirely upon circumstances, and rests in the sound discretion of the court. (*Equitable Life Ins. Society* v. *Stevens*, 63 N. Y. 341; *Hochstein* v. *Schlanger*, 150 App. Div. 124; affd., 208 N. Y. 513; *Stehl* v. *Uris* 210 App. Div. 444; *Darmstadt* v. *Manson*, 144 id. 249.)

It was held in the *Hochstein* and *Stehl* cases (*supra*) that the court was justified in refusing to permit a plaintiff to bring a subsequent suit against one who was liable for the payment of the mortgage debt, but who had not been made a party defendant in a foreclosure action, upon the theory that it is the policy of the law to avoid, wherever possible, a multiplicity of actions, and to dispose of an entire proceeding in one suit."

At page 865 the Court went on to say:

"This is not a case where the creditor was unaware of the relation of principal and surety which existed between the Isgars and the Barbers. The deed, creating such relation, was a matter of public record, and plaintiff was charged with knowledge of its contents. That he had actual cognizance of the fact is evidenced by the allegations in his complaint, setting up this very situation.

The plaintiff recognizing the position in which he has found himself, has made a counter-motion, which I have permitted to come on for hearing at this time, in which he asks to amend the interlocutory judgment of foreclosure and sale *nunc pro tunc*, by inserting therein the names of the defendants George and Lena E. Isgar as parties liable for any deficiency upon the sale of said premises. If this can be done, so that the deficiency judgment can be entered against the Isgars as of the date of its original entry, the defendants Barber would not be released.

Ordinarily, a court has control over and authority to amend its judgments and orders. I think that

such rule is not applicable here. The liability of a surety once released cannot, as a general rule, be revived without his consent. Here, the sureties had a right to rely upon the interlocutory judgment of foreclosure and sale, as it was entered, and which did not provide for any judgment of deficiency against the principal debtors. Plaintiff proceeded to sell under that decree. The defendants Barber had no interest in the property, and, if no personal judgment could be entered against them, none in the sale; they might well have rested easy, ignored the sale, and refrained from bidding. To now permit the judgment to be amended as of the date it was granted, so as to provide for a judgment for deficiency against the Isgars, would be unjust and unfair. It cannot be done after the sale has taken place and has been confirmed. Plaintiff is too late. (*Baehr* v. *Smith*, 169 App. Div. 574; *U. S. Trust Co.* v. *Schliep*, 28 N. Y. Supp. 382; *Mutual Life Ins. Co.* v. *Hoyt*, 15 Wkly. Dig. 489.)"

In *Baehr* v. *Smith* (1915), 169 App. Div. 574, in an action to foreclose a mortgage which demanded a deficiency judgment against one Smith *the judgment failed* to provide for a deficiency against him. The property was sold and a deficiency resulted. After time to file exceptions and to appeal had run plaintiff made a motion to amend the judgment *nunc pro tunc* by inserting a provision for a deficiency judgment. The motion was granted. On appeal the Court reversed it and said (at p. 575):

"I am of the opinion that the order and judgment should be reversed and the motion to amend denied. The judgment, as entered, determined the rights of the parties. (*French* v. *French*, 107 App. Div. 107; app. dis., 185 N. Y. 532.) It made no provision for the recovery of any deficiency from the appellant, and for this reason there was no

necessity for her appealing from it, or attending the sale and protecting, as far as she could, her interest. After the property had been sold and bid in by the plaintiffs it was too late, under the facts here presented, for them to ask that the judgment be amended so that they might take a judgment against her for the deficiency.

The case is analogous to one where a mortgage has been foreclosed and the property sold does not bring sufficient to discharge the debt, and the holder of the mortgage seeks to recover the balance upon a bond. Such an action cannot be maintained without leave of the court (Code Civ. Proc. §1628), and special circumstances must be shown before such leave will be given. (*Equitable Life Ins. Society* v. *Stevens,* 63 N. Y. 341; *Hochstein* v. *Schlanger,* 150 App. Div. 124; affd., 208 N. Y. 513; *Morrison* v. *Slater,* 128 App. Div. 467.)

An authority much in point is *Darmstadt* v. *Manson* (144 App. Div. 249). There the plaintiffs brought an action for the foreclosure of a mortgage and asked in the complaint for a deficiency judgment, but the judgment entered made no provision for a deficiency. Some time after the sale of the mortgaged property, the plaintiffs applied for and obtained leave to bring an action on the bond for the deficiency. In reversing the order granting plaintiffs such leave, and denying the motion, the court said: 'The defendants * * * had no real or apparent interest in the sale of the premises, since the plaintiffs, by failing to proceed in the usual way, through no fault of the defendants, took the risk of selling under the judgment which they had procured. As this did not require the defendants to protect themselves against deficiency by bidding upon the property or otherwise, it would seem to be unjust to permit them now to come in and sue upon the bond. * * * The plaintiffs, by their own neglect, have placed the defendants in a dif-

ferent position from that they would have occupied two years before; in a position which the plaintiffs cannot, in the nature of things, restore, and having elected to stand upon their judgment and to sell the premises, it would be unjust to these defendants to permit this action.

In the case before us the plaintiffs, by amending the judgment after the sale, have accomplished the very thing which the court, in the case just cited refused to permit by an action on the bond. It would be unjust and inequitable, under the facts here presented, to permit the plaintiffs to enter a judgment for deficiency against the appellant. I think the court at Special Term improperly exercised its discretion in permitting such amendment'."

On the facts of the case at bar Chapter 794 of the Moratorium laws did not deprive appellant of any substantial or vested right which she had when she became owner of the collateral bond and the bond and mortgage which she foreclosed. She never had an absolute or vested right to bring an action on the collateral bond after judgment of foreclosure and sale. Mortgagees in the State of New York may choose to foreclose the mortgage and in the action join as parties all persons liable on the bond or guaranty of payment thereof and demand a deficiency judgment against them, or before bringing foreclosure sue on the bond. The appellant chose to foreclose her mortgage. She made the appellee a party to the action and demanded a deficiency judgment against him. After judgment of foreclosure and sale she discontinued her action against him. Having proceeded to judgment of foreclosure and sale she subjected herself to the provisions of Section 1078 of the Civil Practice Act which required her to apply to the Court for leave to bring the present action. Such permission would not be granted unless she showed extraordinary and exceptional circumstances. The general rule

of the courts of New York is to deny such applications. *Scofield* v. *Doscher*, 72 N. Y. 491; *Darmstadt* v. *Manson*, 144 App. Div. 249. In this case the Court said at page 251:

> "It has been universally held that Section 1628 of the Code of Civil Procedure confers no absolute right upon a plaintiff to sue separately after a foreclosure, a person liable for the mortgage debt and who might have been made a party to the foreclosure action, but that the right to do so should be granted only when satisfactory reasons are shown why the personal liability was not prosecuted in the foreclosure suit itself. It was pointed out by Judge Rapallo in *Equitable Life Ins. Society* v. *Stevens* (63 N. Y. 341, 345) that under the Revised Statutes (2 R. S. 191, §153), which are now contained in the Code of Civil Procedure (§1628), 'so far * * * from its being made compulsory on the court to grant such permission in all cases, the general rule was against it, and special circumstances must be shown to justify a separate proceeding at law.' And in *Scofield* v. *Doscher* (72 N. Y. 491) it was said that the 'aim of the statute is to dispose of the matter in one proceeding'."

The amended complaint does not allege the invasion of any constitutional rights of appellant. She had none under the facts presented. Mortgagees in the State of New York never had any absolute, unqualified or vested right to sue on a collateral bond or guaranty of payment of a mortgage after judgment of foreclosure and sale had been entered.

In the case at bar no Court of Equity would grant such permission. The application would shock the conscience of any court because the facts would show that appellant purchased for $10,000 at the foreclosure sale a valuable parcel of real property once mortgaged for

$118,000 in payment of a debt of $60,000 plus interest, and was attempting to obtain in addition a personal judgment for the balance against the appellee.

It will readily be seen that it is unnecessary to pass upon the constitutionality of the law as applicable to the facts of the case at bar, because the amended complaint fails to allege that leave to bring the action was obtained, and also because no substantial legal right of appellant was taken away from her by the act in question. She never had any vested legal right to bring the action.

The lower court therefore had ample authority to dismiss the amended complaint under Section 1078 of the Civil Practice Act and it follows that the decision of the State Court as to the constitutionality of Chapter 794 was not necessary to the judgment that was rendered, and therefore no Federal question is presented.

POINT II.

The Federal question now urged by the appellant is not properly or timely urged.

The record of the foreclosure action shows that this appellant as plaintiff therein, availed herself of all the advantages of the remedies afforded by Chapter 794, the constitutionality of which she now attacks.

In the affidavit of Robert B. Honeyman, her present attorney, verified November 24, 1933, and filed on her motion therein to strike out this appellee's answer and for summary judgment, he stated in part:

> "That part of defendant's answer and amended answer which seeks to avoid a deficiency judgment in the event of the sale of the mortgaged premises and to compel the plaintiff to bid a definite sum for the same has no foundation in law. It is not pos-

sible to determine in advance of the sale what price the premises will bring and it is only after the Referee's Report is filed that the Court can, in accordance with the provisions of Chapter 794 of the Laws of 1933, pass upon the plaintiff's right to a deficiency judgment."

In the memorandum filed on December 11, 1933, by the appellant on the motion to strike out the answers of the defendants, it is stated at pages 2 and 3 thereof:

"The defendant John H. Hanan Realty Co. has no defense to this action and freely admits its default in the payment of interest and taxes on the mortgaged premises. It joins, however, with the other defendant in an endeavor to save the latter from a possible deficiency judgment.

Defendants' attorney apparently has not read Chapter 794 of the Laws of 1933, which help his client in this case to the extent that it provides that the Court shall determine the fair and reasonable market value of the premises permitting a deficiency judgment only for the difference, if any, between said value and the amount of the indebtedness, if the latter figures exceed the former.

Said defense is wholly premature and unnecessary. The estate must receive notice of the application for a deficiency judgment, and upon the hearing or reference will have ample opportunity to prove the assertion that the premises are worth $80,000."

Appellant not only failed to question the constitutionality of Chapter 794 in that action, but entered a judgment therein pursuant to the terms and provisions thereof and expressly referred to it therein (p. , *supra*). She proceeded to sell the property and bought it in herself; she then "duly" made a motion for the deficiency against the John H. Hanan Realty Co.; such application was referred to an Official Referee and on the hear-

ing before him she produced her proofs as to what she considered to be the fair and reasonable market value of the property. The Referee determined the market value thereof to be $70,000, which was greater than the amount due on the mortgage, and his report was confirmed by the Court, and the application for a deficiency judgment was thereupon denied.

The plaintiff took no appeal from that order of confirmation which she entered herself, nor from any other order or judgment in that foreclosure action; but waited a year and then started this action at bar in May, 1935.

The point which the appellee makes is that it was *in that foreclosure action* that the appellant should have raised any question of the constitutionality of Chapter 794. If her rights were unconstitutionally impaired by such chapter, such impairment occurred *then*. The appellant, having failed to urge unconstitutionality in that action, is precluded from doing so in this action and is precluded on this appeal.

6 Ruling Case Law, Secs. 95 and 96:

> "The rule is now generally recognized that one who invokes the provisions of a law may be denied the right to question its constitutionality, and cannot even in subsequent litigation aver its unconstitutionality as a defense.
>
> "Where a complaint is made that an act of the legislature or of an administrative board contravenes a constitutional right, the general rule is that it is the duty of the person whose rights are thus invaded to raise the objection at the earliest available opportunity and to exhaust the remedies which may have been provided for the correction of unreasonable and improper orders, before he will be permitted to make an attack in the courts on the constitutionality of the statute. The failure to raise an opportune objection to an order of the court amounting to an invasion of a constitutional right may amount to a waiver of this right."

Ross v. *Lipscomb,* 83 S. C. 136, 65 S. E. 451;
Kansas City R. R. v. *Stiles,* 242 U. S. 111;
Wall v. *Parrot Silver & Copper Co.* (1917), 244 U. S. 407;
Beaupre v. *Noyes,* 138 U. S. 397;
Electric Co. v. *Dow,* 166 U. S. 489.

In *Wall* v. *Parrot Silver and Copper Co., supra,* the appellants were large stockholders of the appellee corporation. Under statutes of Montana a corporation could sell all its assets upon consent of two-thirds of the stockholders. The sale of the assets of the appellee corporation was made pursuant to said statutes. The statutes further provided that any stockholder dissenting could serve notice to that effect and have the value of his stock fixed by three appraisers and if that appraisal was not satisfactory appeal could be taken to a court and the value there reassessed by a jury. After the sale in question these appellants served notice of dissent and commenced statutory proceedings for the appraisal of their stock. While those proceedings were pending they came before the Supreme Court by direct appeal claiming the said statutes were unconstitutional.

In affirming the decision of the District Court the court said:

> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other States and of a seemingly equitable character, for the reason that the appellants by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes which is still pending, waived their rights to assail the validity of them. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *Electric Co.* v. *Dow,* 166 U. S. 489; *Pierce* v. *Somerset Railway,* 171 U. S. 641; *Leonard*

> v. *Vicksburg, Shreveport & Pacific R. R. Co.,* 198 U. S. 416, 422. They cannot claim the benefit of statutes and afterwards successfully assert their invalidity. There is no sanctity in such a claim of constitutional right as prevents it being waived as any other claim of right may be."

In *Electric Co.* v. *Dow,* 166 U. S. 489, it was held that a party by taking advantage of a statute of New Hampshire, and joining in a trial for the assessment of damages pursuant thereto was precluded from denying the validity of the statute, as the said party was at liberty to exercise the privilege or not as he saw fit.

In *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, appellant sought a temporary injunction restraining the Virginia Commission of Fisheries from removing the stakes and marks which designated the boundaries of certain oyster grounds planted by him and which he claimed the right to occupy, and thereby opening the same for public use and enjoyment. He maintained that the Commission was proceeding under a state statute invalid because it failed to provide for proper notice and hearing and that the proposed action would deprive him of property without due process of law contrary to the 14th Amendment. The court said:

> "A majority of the three judges composing the Court below concluded—264 Fed. 116—that the Commission had acted in substantial compliance with the challenged statute, that whatever rights of property appellant claimed in respect of the specified lands or the oysters thereon, were necessarily based on the statute itself and that he could not both assail it, and rely upon it in the same proceeding. *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles,* 242 U. S. 111, 117."

In the foreclosure action the appellee in his answer pleaded the existence of the emergency and the equitable powers of the court to prevent an unjust enrichment. He was prepared to have these powers determined on appeal if such a course should be necessary. The appellant by adopting the procedure provided in Chapter 794 for a deficiency judgment precluded both herself and the appellee from obtaining a determination of the powers of the court of equity under the circumstances.

The Appellate Division of the New York Supreme Court in the Second Department strongly maintained that such powers exist in adequate measure regardless of any statute (*Monaghan* v. *May*, 242 App. Div. 64, and *Guaranteed Title and Mortgage Co.* v. *Scheffres*, 247 App. Div. 294).

Moreover by attempting to obtain a deficiency judgment against the mortgagor in the foreclosure action before her rights against the appellee were determined, the appellant not only released the appellee (*Tousey* v. *Isgar*, p. 12, *supra*), but estopped herself from raising the question of the constitutionality in a subsequent and separate action.

If the appellee should be held liable in this action on the grounds of unconstitutionality he could not recover from the mortgagor because the obligation sued upon by its terms is void if the mortgage has been discharged and the failure of the appellant to raise the question of constitutionality in the foreclosure action operated to discharge the mortgage.

Furthermore, even in the present action the amended complaint does not allege unconstitutionality and in opposing the motion to dismiss at Special Term the appellant made no claim that she was the victim of any unconstitutional statute. It was not until the cause reached the Appellate Division of the Supreme Court

that the appellant complained about the statute being unconstitutional.

It is therefore submitted that even if Chapter 794 is unconstitutional the appellant cannot in this action take advantage of that fact.

POINT III.

The decision of the State Court on the question raised is in express harmony with the uniform decisions of this Court.

The Mortgage Moratorium laws of New York are well within the doctrines established by the decisions of this Court as laid down in the *Blaisdell* case and the "Rent cases".

The Collateral argument on this point is made under Point IV, *infra*.

POINT IV.

Chapter 794 of the Laws of 1933 of the State of New York is constitutional.

It is submitted that any legislation conforming to the essential criteria established by the decisions of this Court and laid down in the *Blaisdell* case constitutes a proper exercise of the state police power. In that decision these criteria were set forth at pages 444-447 as follows:

> 1. **"An emergency existed * * * which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community."**
>
> 2. **"The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society."**

3. "In view of the nature of the contracts in question—mortgages of unquestionable validity— the relief afforded and justified by the emergency, in order not to contravene the constitutional provision could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions."

4. "The conditions upon which the period of redemption is extended do not appear to be unreasonable, being based upon equitable principles as determined by the Court in its discretion."

5. "The legislation is temporary."

1. The Emergency.

The appellee anticipates that the briefs to be filed by the Attorney General of the State of New York and by counsel to the Real Estate Board of New York, *amici curiae,* will go deeply into the details and statistics of the plight with which real estate owners were confronted before the passage of these laws, and of their appropriateness as proven by the improvements resulting therefrom.

However, it is a matter of common knowledge, of which this Court will take judicial notice, that from 1932 and throughout the years 1933 and 1934 a great economic emergency of unparallelled magnitude existed and continued. It was state, nation and world wide; unemployment prevailed; men were starving and homeless; millions were on relief; fortunes were wiped out; banks failed; industry was at a standstill; loans from bank and other loaning institutions could not be had; many lost their homes and farms. There was great deflation in all kinds of securities, especially real estate securities; defaults in payment of interest and taxes on property were very numerous; liquidation in all kinds of securities occurred; many breaches of the peace occurred in many parts of the country where

mortgage holders attempted to enforce their legal remedies. People were driven to desperation, mob violence and riots occurred in many parts of the country. The Federal and State governments passed many relief measures. The peace of the country was seriously threatened.

In New York billions of dollars were invested in real estate securities by citizens from all parts of the country through mortgage guarantee companies. Most, if not all, of these companies were in the hands of the Insurance Department of the State in liquidation. Banks refused to make loans on the best of real estate securities or any other kind of security. Value was in real estate but the value could not be obtained. There was no market of any kind in real estate. Free liquidation in real estate securities would necessarily result in widespread ruin to real estate owners. Of these conditions the New York Court of Appeals took judicial notice in *Klinke* v. *Samuels* (*infra*), and in the case of *Matter of the People* (*Title & Mortgage Guarantee Co.*), 264 N. Y. 69 where the said Court said (at p. 85):

> "Owing to a sudden change in economic conditions many owners of real estate are unable at the present time to meet the obligations of the mortgages on their property. Defaults are numerous and immediate liquidation of a substantial amount of these mortgages through foreclosure or other court proceedings 'would so demoralize the general real estate market that there might be realized on such bonds, mortgages or other security substantially less than the face amount thereof and substantially less than what would be realized if they were disposed of in an orderly manner over a reasonable period of time.' Free liquidation now of such obligations would result 'in such unprecedented demands upon the resources of the guaranty

corporations that their resources would be sufficient to pay only a relatively small portion of such demands.'

It cannot be doubted that the free liquidation of great amounts of indebtedness secured by mortgages would result in widespread ruin to real estate owners and in probable widespread damage to investors. That situation affects the economic welfare of the community and affects the vital interests of the community. Legislation intended to relieve that situation is directed towards a legitimate end."

The Legislature of the State, with these conditions confronting it, exercised its reserved power and enacted the so called Mortgage Moratorium Laws in order to prevent riots, breaches of the peace, and to promote the general welfare of its citizens during the economic crisis. The laws were directed to a legitimate end and purpose. They were temporary measures to last only during the emergency which the Legislature then estimated would last until July 1, 1934.

Appellant does not contend an emergency did not exist or that it had ceased at the time she foreclosed her mortgage. That it existed at that time and continued for a long time thereafter are historical facts of which this Court will take judicial notice. Further, there is the legislative declaration that it existed during all of 1934.

Section 1 of Chapter 794 provides:

"It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other

adverse conditions, exists. Therefore in the public interest the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination."

This Court has held that such a declaration, while subject to judicial review, is always entitled to the greatest respect (*Block* v. *Hirsh* (1921), 256 U. S. 135, 154) and stated in the *Blaisdell* case (at p. 444):

> "The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. *Block* v. *Hirsh, supra.* The finding of the legislature and state court has support in the facts of which we take judicial notice. *Atchison T. & S. F. Ry. Co.* v. *U. S.*, 284 U. S. 248, 260."

There can be no doubt that the emergency which existed in Minnesota was no different than that which existed in New York, except that the condition in New York was more acute by reason of there being a greater number of parcels of real estate and therefore a greater number of mortgages and foreclosures. (See excerpt from decision of Court of Appeals in *Klinke* v. *Samuels, infra.*)

In the *Atchison* case, *supra,* this Court said (at p. 260):

> "There can be no question as to the change of conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact dominating thought and action throughout the country. As the Interstate Commerce Commission said in its

recent report to the Congress, 'a depression such as the country is now passing through is a new experience to the present generation'."

The New York Court of Appeals has in many decisions sustained the validity of these laws as within the reserve powers of the state. It also took judicial notice of the emergency, and held that the said laws protected guarantors of mortgages.

Klinke v. *Samuels* (1934), 264 N. Y. 144;
City Bank v. *Ardlea,* 267 N. Y. 224;
Kramer v. *Relgov,* 268 N. Y. 592;
McCarty v. *Prudence Bonds* (1933), 149 Misc. Sup. Ct. (N. Y. Co.) 13, 14.

In the *Matter of Application of People of the State of New York,* 264 N. Y. 69, which upheld the constitutionality of another emergency statute, known as the Schackno Act, the Court at page 94 said:

"Extra-ordinary conditions may call for extra-ordinary remedies. Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the reserved power of the State and whether the remedy adopted by the state is reasonable and legitimate. An individual may not justly complain of a reasonable legislative invasion of his usual rights or a reasonable legislative restriction of his usual liberty for the purpose of averting an immediate danger which threatens the safety and welfare of the community."

And at page 97 said:

"We find that economic conditions create an immediate danger to the economic welfare and the vital interests of the community. We find the Legislature in the exercise of its reserved power has adopted a remedy which is reasonably calcu-

lated to meet such conditions. No impairment of contract which results will substantially injure any person. The statute merely furnishes a shield against unreasonable attack on the vital interests of the community and an additional remedy for enforcement of obligations in manner fair to all."

The police power of the state is vested in the Legislature which has the duty and responsibility of determining if and when the emergency exists and how it will be met. Such power extends to the preservation of peace and maintaining good order throughout the state and to the protection of the property of its citizens and their general welfare, comfort and convenience. Everything necessary for the protection, safety and best interests of the people may be done under this power and in its exercise, persons and property may be subjected to all reasonable restraints and burdens for the common good for it is within the general powers of a government to preserve and promote the general welfare even at the expense of private rights and every owner of property holds the same subject to this power.

Patterson v. *Kentucky,* 97 U. S. 501;
Barbier v. *Connolly,* 113 U. S. 27;
Hannibel v. *Husen,* 195 U. S. 465;
Mugler v. *Kansas,* 123 U. S. 623;
Atkin v. *Kansas,* 191 U. S. 207;
Jacobson v. *Massachusetts,* 197 U. S. 11;
People v. *La Fetra,* 230 N. Y. 429;
Gutag v. *Schatzkin,* 230 N. Y. 647.

2. A Legitimate End.

Under the Tenth Amendment to the United States Constitution the police power is reserved to the States. Accordingly, the provisions of the Constitution as to

the impairment of the obligation of contracts are subject to this reserved police power of the States. Justice Kellogg in *Sliosberg* v. *N. Y. Life Ins. Co.* (1927), 244 482, cert. den. (1927), 275 U. S. 526, pointed out, at page 497:

> "* * * That the government may be required, in times of public stress, so to legislate as to nullify private contracts is an implied term of the law of every contract, so that such legislation, if enacted, does not impair the obligation of the contract within the meaning of the limitation. * * *"

The relation of contract rights to State police power was discussed by Mr. Justice Holmes in *Marcus Brown Holding Co.* v. *Feldman* (1921), 256 U. S. 170, as follows, at page 198:

> "* * * But contracts are made subject to this exercise of the (police) power of the State when otherwise justified, as we have held this to be. * * *"

In the *Feldman* case this Court had before it the statutes of New York, Laws of 1920, Chs. 942-947, 951, declaring that a public emergency existed, directly interfering with the enforcement of covenants for the surrender of the possession of premises on the expiration of leases. Within the City of New York and contiguous counties, the owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September, 1920, lodging houses for transients and the larger hotels) were wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect (save in certain specified instances), providing the tenants or occupants were ready, able and willing to pay a reasonable rent or price for their use and occupation.

In the case of *Block* v. *Hirsch,* 265 U. S. 135, which was also one of the "rent cases" this Court said at page 155:

> "The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of private concern. It is enough to refer to the decisions as to insurance, in *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; irrigation in *Clark* v. *Nash,* 198 U. S. 361; and mining in *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest, *Mount Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.,* 240 U. S. 30, 32 and that the public interest may extend to the use of land. They dispell the notion that what may be only a private transaction may not be raised by its class or character to a public affair. See also *Noble State Bank* v. *Haskell,* 219 U. S. 104, 110, 111."

In the *McCarty* case, *supra,* which involved the statute in question, the Court (Untermyer, *J.*), referred to the "rent cases" and stated at page 15:

> "In those cases the Courts sustained statutes enacted on account of a shortage in housing facilities, which allowed the tenant to remain in possession of premises after the expiration of the lease, upon payment of reasonable rent, notwithstanding an express covenant on his part to surrender possession at the expiration of the term. The right of a landlord to recover possession of his property from

a tenant whose lease had expired and the contractual obligation of the tenant to surrender the premises at the end of the term were held to be subject to the police power of the state when circumstances had clothed the renting of dwellings with a public interest. That which is true of land is true of money in a critical period of financial disturbance."

The Court sustained the validity of the above Emergency Rent Act and similar legislation in the District of Columbia, predicating its conclusion on the findings that—

1. An emergency existed and warranted the exercise of the latent police power of the State;

2. The housing business became affected with a public interest as the result of such emergency;

3. The legislation was temporary in character, being limited to a period of two years; and

4. The landlord was compensated, at least in part, to the extent of receiving a reasonable rental (*cf.* 290 U. S. 398, 441-442).

It will be noted that all of these elements are present in the Minnesota and New York moratorium legislation.

1. Thus the Minnesota law of 1933 (Ch. 339, Part One, sec. 1) declares the existence of an economic emergency. A similar declaration is found in New York L. 1933, Ch. 793, Sec. 1, and Chapter 794, Sec. 1.

2. As pointed out in *Block* v. *Hirsh, supra* (p. 155), a business which is ordinarily purely private, such as housing, may become affected with a public interest during an emergency. Undoubtedly such was the case with the real estate mortgage business during the present depression.

3. The Minnesota and New York laws originally expired in 1935 and 1934, respectively. This period has been advanced in both cases to 1937.

4. Finally, both the Minnesota law (Part One, Section 4) and C. P. A., Section 1077-a, *et seq.*, provide adequate compensation for the temporary suspension of the mortgagee's remedies.

This Court cited with approval the rent cases in upholding the Minnesota Moratorium Law in the following language of Mr. Chief Justice Hughes in the *Blaisdell* case (at p. 444):

> "* * * The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts and there is no greater reason for refusing to apply this principle to Minnesota mortgages than to New York leases."

Nor is there any greater reason for refusing to apply this principle to New York mortgages than to New York leases.

3 & 4. Appropriateness and Reasonableness.

The Minnesota statute, known as Chapter 339 of Laws of 1933 which became a law on April 18th, 1933 provided (Sec. 4) that during the two years following the passage of the act in any foreclosure action where the period of redemption had not expired, the period of redemption could be extended by the Court

> "for such additional time as the Court may deem just and equitable but in no event beyond May 1, 1935; provided that the mortgagor or the owner in possession * * * shall prior to the expiration of the period of redemption, apply * * * for an order determining the reasonable value of the income on said property, or, if the property has no

income then the reasonable rental value * * * and directing and requiring such mortgagor * * * to pay all or a reasonable part of such income or rental value" etc.

And said section further provides:

"Provided, further, that prior to May 1, 1935, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this act has expired."

As to the appropriateness and reasonableness of the Minnesota statute, Mr. Chief Justice Hughes said, at page 445:

"As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee purchaser to title and to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he may pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession."

Under the New York statute, therefore, the same rights are preserved. And *in addition* the mortgagee under Chapter 793 (Sec. 1077-c of C. P. A.) has the right, where the income *is more* than enough to pay the carrying charges and interest, to have that balance

applied on account of any past due principal. This is a privilege which the mortgagee does not have under the Minnesota statute.

All that Chapter 794 of the act does is to require, in actions brought during the ten month emergency period, that the Court determine "the fair and reasonable market value" of the mortgaged premises and deduct that from the amount due in determining the deficiency instead of deducting the amount bid which is very often only a nominal amount determined solely by the mortgagee, as in the case at bar. Even during such emergency period the right to a deficiency is not suspended. The mortgagee may still obtain a deficiency judgment for any amount by which the principal debt, plus interest and costs, exceeds this "fair and reasonable market value of the property."

The Court of Appeals of New York in construing this section of the statute as to how this value is to be determined has said in *Heiman* v. *Bishop*, 272 N. Y. 83, at pages 86, 87:

> "Prior to the depression, the method of determining the market value of real property was fairly well established by the decisions of the courts. In a general way, the market value of real property is the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell.
>
> It is to be noted that in the various definitions of market value of real property stated by the courts there appears the words 'under ordinary conditions' or 'under ordinary circumstances' or words of like import. Certainly, during the depression, ordinary conditions have not existed in the real property market. Conditions in that market have been extraordinary and unprecedented. The Legislature when it enacted section 1083-a understood

those conditions and it was because of such conditions that the section was enacted. Nevertheless, the section requires the court to determine the market value of the premises. In the depressed condition of the market for real property, the old standard of market value has become utterly useless. The new and unusual conditions necessarily required a new standard for determining value, otherwise the section would have the effect of depriving mortgagees of deficiency judgments in practically all cases. That certainly could not have been the intent of the Legislature."

And at page 88:

"In a proceeding under section 1083-a, the court should receive evidence of the age and construction of the buildings on the premises, the rent received therefor, assessed value, location, condition of repair, the sale price of property of a similar nature in the neighborhood, conditions in the neighborhood which affect the value of property therein, accessibility and of all other elements which may be fairly considered as affecting the market value of real property in a given neighborhood. With such evidence before it, the trial court, in the exercise of its best judgment, should determine the market value of the premises in the existing circumstances."

The Act Merely Puts Into Effect at a Time of Great Economic Stress Equitable Principles Which Have Long Been Recognized in the Foreclosure of Mortgages.

Courts of equity have always had the power to impose conditions upon the purchase by the mortgagee at a foreclosure sale. In the earlier cases he was considered a quasi-trustee and was ineligible to purchase property on foreclosure (Jones on Mortgages Secs. 1614-a, 1635). Recognizing that this often worked hardship on a mortgagee the courts developed the practice

of allowing the mortgagee to purchase and in the United States by statute, judicial construction or customary permission this restriction was largely removed.

In 1849 a rule of practice was adopted in New York which has developed into the present Rule 259 of the Rules of Civil Practice which reads:

> "*Unless otherwise specially ordered* by the court, the judgment should direct * * * that the plaintiff or any other party may become a purchaser at such sale." (Italics ours.)

In the case at bar the appellant, as plaintiff, was permitted by the judgment prepared by her in her foreclosure action to buy in and she did buy in at the sale.

It stands to reason that the lack of competition at foreclosure sales during the depression has been due in some part to the privilege accorded the mortgagee to buy in. Seldom is there more than one bid and then only by some subordinate lienor hoping to protect his lien. Prospective buyers know that the mortgagee can bid up to the value of his debt without having to make any outlay of cash; realizing for this reason it is impossible to purchase the property at a price less than the mortgage debt, persons who might otherwise become buyers avoid foreclosure sales.

Since the possibility of a double recovery arises from the privilege of purchasing accorded to the mortgagee, as actually exists in the case at bar, a court of equity would certainly have the power to protect the mortgagor by imposing reasonable conditions upon the exercise of such privilege such as the conditions imposed by this statute which is now attacked. The power is expressly reserved to the court by this rule 259.

The basis of such relief is historical surviving in this current rule of practice. It cannot be questioned as unconstitutional because the right of a court to deny a

mortgagee the privilege of purchasing at the sale antedates any mortgage that might now come up for foreclosure.

In New Jersey, mortgage moratorium statutes were held invalid because not limited to the period of an emergency (*Vanderbilt* v. *Brunton,* p. 53 *infra*). At the same time, however, the Law and Chancery courts sustained the inherent power of equity to protect borrowers from undue exactions of lenders seeking deficiency judgments. In doing so they took judicial notice of economic conditions and determined, as the cases were presented, the beginning, extent and duration of the depression and its effect on forced sales of real estate; in other words, the period during which emergency conditions may be said to exist which justify the exercise of inherent equity power.

In *Federal Title, etc., Guaranty Co.* v. *Lowenstein* (113 N. J. Eq. 200; 166 A. 538), decided May 9, 1933, the historical phase in respect of inherent power is developed at length at pages 207-209, by Vice Chancellor Berry and concurred in by Vice Chancellors Backes and Stein.

In *Young* v. *Weber* (117 N. J. Eq. 242; 175 A. 273), Vice Chancellor Berry (Nov. 10, 1934) re-examined the historical basis for sustaining inherent equity jurisdiction to refuse, where in equity and good conscience it should, a deficiency judgment. This opinion was concurred in by all the Vice Chancellors and the Chancellor, that is, the entire Chancery Bench of the State of New Jersey. He there pointed out that exercising that jurisdiction was an enforcement in part of the ancient equitable maxim, "equity will not suffer a double satisfaction to be taken", and he quoted with approval from an earlier case in which Backes, V. C., wrote: "Satisfaction of the debt and not pillage of the debtor's estate

is equity's relief." To the same effect is *Better Plan B. & L. Assn.* v. *Holden* (114 N. J. Eq. 537; 169 A. 289).

In Wisconsin that equitable doctrine has also been invoked (*Suring State Bank* v. *Giese,* 210 Wisc. 489).

New York courts have evinced a similar tendency (*Monaghan* v. *May,* 242 App. Div. 64; and *Guaranteed Title and Mortgage Co.* v. *Scheffres,* 247 App. Div. 294). In *Emigrant Industrial Savings Bank* v. *Bokkelen,* 269 N. Y. 110, the Court of Appeals indicated that the question was still open and evidently to avoid any misunderstanding said it was not approving the decision in the *Monaghan* case. On the other hand it did not reject it.

It was obviously to such powers of courts of equity to which Mr. Justice Hughes made reference in his opinion in the *Blaisdell* case when he said at page 446:

> "In the absence of legislation Courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience."

It would be difficult to find a better example of "inadequacy of price" and unjust enrichment than in the case at bar. Here was a piece of property comprising a seven story loft building on a corner, with a frontage of 90 feet on one street and 63 feet on another bought in by the appellant for $10,000 when it was appraised for tax purposes at $85,000. She does not ask for a judgment for the difference between the amount due on her mortgage and the $45,000 which she conceded, through her expert witness, the property was worth when she bid it in (*supra,* p. 6), but she asks for judgment for the difference between the amount due on her mortgage and the $10,000 at which she bid in the property.

A court of equity would readily refuse such a demand as unconscionable even if there was no such emergency statute. The statute preserves to the mortgagee the right to the same deficiency judgment to which she would have been entitled in normal times and the right of payment of her *real* mortgage debt in full, but it also tends to avoid unjust enrichment to a mortgagee at the expense of the mortgagor as this appellant now seeks.

The Statute Here Regulates the Remedy and the Mode of Procedure Only for the Enforcement of the Obligation and Does Not Impair the Obligation Itself.

Mr. Justice Hughes in the *Blaisdell* case at page 433, referring to the control of the state over remedial processes quoting from an earlier case (*Penniman's* case, 103 U. S. 714, 720), said:

> "The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."

This act is not in derogation of substantial contractual rights. It merely establishes, as a temporary expedient, during a period of great economic stress, a change in the method of procedure to collect a mortgage debt.

5. The Legislation Is Temporary.

> "It is limited to the exigency which called it forth" (*Blaisdell* case, *supra*, p. 447).

The statute expressly defined and limited the period of emergency to be from the date of its enactment, August 26th, 1933 to July 1st, 1934, a period of ten months and five days.

The New York Court of Appeals in *Klinke* v. *Samuels, supra,* at page 149 said:

> "As to the constitutionality of these provisions we must remember that the limitation upon the remedy in both or all instances is until July 1, 1934. There being no market for real estate of any kind, and the banks refusing to loan money on the best real estate security, owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property but the value could not be obtained nor anything like it. To prevent worse and more extensive evils and suffering, the Legislature had asked through these laws, for security holders to wait a reasonable time for universal economic conditions to improve, provided interest and taxes are paid.
>
> After next July all remedies, so far as these present laws apply, will again be open to the mortgage creditors.
>
> That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in *Matter of People (Title & Mortgage Guarantee Co. of Buffalo)* (264 N. Y. 69), and *Home Building & Loan Assn.* v. *Blaisdell* (290 U. S. 398)."

The requirement of temporary operation is thus fully satisfied so as to comply with the observation of Mr. Justice Holmes in *Block* v. *Hirsh, supra,* at page 157 of 256 U. S. that:

> "A limit in time, to ride over a passing trouble, may well justify a law that could not be upheld as a permanent change."

At page 4 of her brief and in the Appendix to her brief the appellant mentions the extensions of this legislation enacted since 1934. However, this Court is not

concerned here with those extensions or their reasonableness because the appellants foreclosure action hereinbefore referred to was instituted and completed before the expiration of the original emergency period provided for, viz,—August 26, 1933 to July 1, 1934.

The Appellant's Contract Has Not Been Materially Impaired.

Appellant complains under Point II of her brief that Chapter 794, if applicable to the collateral bond, materially impairs her contract rights.

The appellee submits:

1. Appellant's contract was impliedly subject to the possible future exercise of the State police power for legitimate ends. (*Home Bldg. & Loan Assn.* v. *Blaisdell, supra,* 439; *Marcus Brown Holding Co.* v. *Feldman, supra,* 198.)

2. Appellant had no vested right in the then existing remedies for breach of her contract. The Legislature was authorized to change them.

See *Waggoner* v. *Flack* (1903), 188 U.S. 595, 602:

> "* * * It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away."

Oshkosh Waterworks Co. v. *Oshkosh* (1903), 187 U. S. 437, 439:

> "* * * But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract * * *."

3. She had no absolute vested right to sue on the collateral bond. It was subject to leave of the Court as provided in Section 1078 of the Civil Practice Act which the Court had power to refuse.

The appellant also argues that since the interest and taxes were in default she had no choice but to foreclose and take over the property. That is not so. The Legislature gave her the choice of waiting until July 1, 1934, the date when it estimated the emergency would be over, or of foreclosing her mortgage before that time and submitting to the court the question of how much of a deficiency judgment, if any, she was entitled to. She chose the latter method without any complaint.

Instead of waiting this appellant evidenced every desire to take over the mortgaged premises as quickly as possible. She commenced her action on September 22nd, 1933, and bought in the property on March 2nd, 1934.

The appellant also complains that prior to the enactment of this statute the appellant was entitled to a deficiency judgment as a matter of course. That is not so. Courts of other states have held to the contrary (*Federal Title Co.* v. *Lowenstein* (N. J.), p. 40, *supra*; *Young* v. *Weber* (N. J.), p. 40, *supra*; *Better Plan B. & L. Assn.* v. *Holden*, p. 41, *supra*; *Suring State Bank* v. *Giese* (Wis.), p. 41, *supra*; *Beaver County*

Bldg. and Loan Assn. v. *Winovich* (Pa.), p. 18 of Appellant's Brief) and courts of New York have approved the doctrine (*Monaghan* v. *May,* and *Guaranteed Title & Mortgage Co.* v. *Scheffres,* p. 41, *supra*).

Further the appellant has no cause for complaint. She never applied for a deficiency judgment as a matter of right but instead she voluntarily applied for a deficiency judgment pursuant to the procedure prescribed by Chapter 794. Appellant was not entitled to such a judgment as a matter of course. An action to foreclose a mortgage is one in equity and by submitting to the jurisdiction of a Court of equity she subjected herself to all rules of equity. Sales on foreclosure are subject to confirmation by the Court and may be set aside for inadequacy of price. *Land Finance Corporation* v. *Giorgio, Jr.,* 235 App. Div. 627. Leave to sell under a judgment may be withheld in abnormal times unless there is reasonable assurance of competitive bidding: *Bank of Manhattan* v. *Ellda,* 147 Misc. 374. Courts of equity may mold their relief and remedies to meet the conditions with which they have to deal.

Further, if appellant had a right to a deficiency judgment as a matter of course she waived it by voluntarily submitting to the procedure prescribed by said Chapter 794. She cannot avail herself of the provisions of the Act and when she finds that the Court decided against her, not appeal from the decision and bring a separate action to recover what was denied her. The orderly administration of justice required her to appeal and thereby directly present the question of unconstitutionality of said chapter. As now presented to this Court, even if it should hold it unconstitutional, appellant still has no cause of action because she did not procure leave to sue pursuant to Section 1078 of the Civil Practice Act, which leave would be denied to her as hereinbefore pointed out.

When this statute, passed to tide over such emergency, gave the mortgagee the right to a deficiency judgment for the difference between the amount due and the "fair and reasonable market value" (as determined under the procedure laid down in the Court of Appeals decision of *Heiman* v. *Bishop, supra*) it preserved to the appellant the same rights which she had in normal times and took nothing from her.

The Provisions of Chapter 794 of the Laws of 1933 Do Not Impair the Obligations of Appellant's Contract and Do Not Violate the Constitutional Prohibition Upon Such Legislation, as Claimed by the Appellant.

Under appellant's Point III she urges that this statute violates Article 1, Section 10 of the Constitution and cites a number of decisions by this Court all the doctrines of which were considered, mentioned and distinguished in the *Blaisdell* case. Mr. Justice Hughes saying (p. 434):

> "None of these cases, and we have cited those upon which appellant chiefly relies, is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period. And broad expressions contained in some of these opinions went beyond the requirements of the decision, and are not controlling. * * *".

The appellant argues that the principle stated in the *Blaisdell* case "has been materially clarified" by subsequent decisions of this Court in the cases of *W. B. Worthern Co.* v. *Thomas, W. B. Worthern Co.* v. *Kavanaugh,* and *Louisville Bank* v. *Radford.*

The appellee submits that the New York Moratorium laws are not open to the same objections which caused

this Court in the two *Worthern* cases *supra* to invalidate the two Arkansas statutes providing respectively for a mortgage moratorium without compensation to the mortgagee and for the unlimited, absolute and retroactive exemption of life insurance from garnishment. Unlike the New York Moratorium Law, these Arkansas statutes did not contemplate a mere temporary suspension of remedies upon reasonable terms. Instead, they effected the complete destruction of the creditor's rights without compensation to him in any form. As was pointed out in the *Kavanaugh* case by Mr. Justice Cardozo, at page 61 of 295 U. S.:

> "* * * The case is one of postponement for a term of many years with undisturbed possession for the debtor and without a dollar for the creditor. * * *"

In discussing the utter lack of compensation afforded to the creditor, this Court said in part, at page 61:

> "* * * Relief is not conditioned upon payment of interest and taxes or the rental value of the premises. * * *"

It is clear that this Court in the two *Worthern* cases has indicated the limitation to which the doctrine of the *Blaisdell* decision may be carried. The law which the legislature of New York enacted fully meets the acid tests of the decisions of this Court.

The last paragraph of the quotation from the decision in the *Worthen* v. *Thomas* case (Appellant's Brief, p. 17) readily shows the distinction between that case and the case at bar.

The distinction between the *Louisville Bank* v. *Radford* case and the *Blaisdell* case was pointed out by Mr. Justice Brandeis at page 581 where he said:

> "Statutes for the relief of mortgagors, when ap-

plied to preexisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W. B. Worthen Co.* v. *Kavanaugh, ante,* p. 56, when it appeared that this substantive right was substantially abridged. Compare *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426" (p. 581).

In the case at bar the New York statute preserves substantially the remedies of the mortgagee.

The appellant quotes a substantial part of the recent decision of the Supreme Court of Pennsylvania in the case of *Beaver County Building and Loan Association* v. *Winovich,* wherein the Supreme Court of that state held unconstitutional the Deficiency Judgment Statute of Pennsylvania.

In order to arrive at its decision the Pennsylvania Court disposed of the *Blaisdell* case upon the theory that the statute in the latter case suspended a remedy, whereas the Pennsylvania statute did not suspend the remedy but impaired a substantive right.

Whatever may have been the provision of the statute so as to justify the conclusion of the Pennsylvania Court, the reasoning does not apply to Chapter 794 because that statute is nothing more than a suspension of the remedy with provision made for alternative relief. In effect it suspends during the period of emergency the right of a mortgagee to pursue his usual remedies unless the mortgagee is satisfied to credit against the mortgage indebtedness the reasonable value of the mortgaged property. It no more interferes with the substantive rights than does the Minnesota statute which

suspends during the emergency the right of the mortgagee to obtain an absolute title if reasonable compensation be paid to the mortgagee during the interval.

Further the Pennsylvania State Constitution expressly provided that the legislature shall not pass any local or special law authorizing the impairment of liens; or providing or changing methods for the collection of debts or enforcing judgments or prescribing the effect of judicial sales of real estate.

The mortgagee in that case obtained a money judgment, on the bond and mortgage, which was perfected and docketed on December 27th, 1933, On the same day the judgment creditor issued a writ of execution to sell the mortgaged premises to satisfy the debt. The legislation held unconstitutional as impairing the judgment became effective January 17th, 1934, twenty days after the judgment was obtained and the writ of execution issued thereunder.

Most of what the prevailing opinion said was *obiter*. The decision must be confined to the fact that the act took effect after the judgment was obtained and the writ of execution issued and the act was clearly prohibited by the State Constitution. It was not necessary for the Court to pass on the impairment clause of the Federal Constitution.

The New York statute does not affect any final judgments obtained before the effective date of the emergency laws. It expressly preserves the rights acquired under any such judgments (Chapter 793, Section 1077-e of the Civil Practice Act).

It should also be noted that in the *Pennsylvania* case the Court concluded that prior to the enactment of the statute involved the extent to which a debtor was released from personal liability on the foreclosure of a mortgage was measured by the selling price of the mortgaged property obtained by the Sheriff irrespective of

any other value and that the mortgagee could become the purchaser at the sale without restriction. Neither of these statements represent the law of New York prior to its moratorium laws. In New York a court of equity has always enjoyed the power to set aside an inadequate and unconscionable bid (pp. 40-41, *supra*) and Rule 259 of its Rules of Civil Practice expressly reserves to the court the power to deny to the mortgagee the privilege of becoming the purchaser (p. 39 *supra*).

The peculiarity of the Pennsylvania statute and the reasoning of the Pennsylvania Court are probably explained by the fact that in Pennsylvania equitable jurisprudence has had a limited and distorted existence by reason of the early determination in that commonwealth to abolish courts of equity. (See 1 Law Quarterly Review, 455 and 1 Pomeroy Equity Jurisprudence, Sec. 338.) One of the judges concurring in the opinion of the Pennsylvania Court seems to have been influenced by the belief that even in that State equity enjoyed sufficient power, without a statute, to protect the mortgagor. Another member of the Court wrote a strong dissenting opinion.

The appellant at pages 22 and 23 of her brief cites various decisions which she claims are authorities for the argument that the vacation or serious modification of preexisting law as it affects an existing contract is repugnant to Section 10 of Article 1 of the Constitution. These decisions were concerned with legislation enacted in normal times when the rights of the parties and the public interests were not affected by unusual conditions.

That which is normally the subject of private treaty and which ordinarily constitutes a strictly private right may, in moments of emergency, become a vital public interest justifying interference by the state (*Wilson* v.

New, 243 U. S. 332). The emergency produces the necessity for legislation and the necessity justifies the exercise of the police power over property and contracts alike (*Union Dry Goods Co.* v. *Georgia Public Service Commission,* 248 U. S. 372).

The appellant also cites on page 23 of her brief seven cases where she contends that State Courts have held as unconstitutional "similar legislation".

Travellers Ins. Co. v. *Marshall,* 124 Tex. 45 (1934), did not pass upon the validity of the Texas moratorium laws under the Federal Constitution. The Court there considered only the contracts clause of the Texas Constitution of 1877 which, unlike the contracts clause of the Federal Constitution, was in terms made a limitation on the police power of the State.

In the case of *Federal Land Bank of Omaha* v. *Wilmarth,* 218 Iowa 339 (1934), the Court specifically said (at p. 352):

> "* * * No question is raised in this case concerning the constitutionality of the above-quoted statute now under consideration. * * *"

The constitutionality of such legislation had already been upheld in *Des Moines Joint Stock Land Bank* v. *Nordholm* (1934), 217 Iowa 1319, followed in *Craig* v. *Waggoner* (1934), 218 Iowa 876, and *Tusha* v. *Eberhart* (1934), 218 Iowa 1065.

The case of *Hanauer* v. *Republic Bldg. Co.,* 216 Wis. 49, is clearly distinguished from the *Blaisdell* case by the Court where it says (at p. 58):

> "* * * The statute in the *Blaisdell* Case was definitely limited as to time. While Sec. 269.58 is stated to have been enacted in response to the present emergency, it contains no provision definitely limiting its terms * * *."

The case of *Langever* v. *Miller,* 124 Tex. 80 (1934), was expressly distinguished from the *Blaisdell* case by the Court (at p. 86):

> "The Act in the instant case, while passed because of the prevailing industrial depression, is not a limited duration. Its effect is not confined to the period of emergency conditions, as were the Housing and Rents Cases * * * and the *Blaisdell* case, * * * but it is a permanent law intended to prevail until repealed or amended by the Legislature. That line of cases would not sustain the validity of the Act, * * *"

She also cites, at page 20 of her brief, the case of *Vanderbilt* v. *Brunton Piano Co.,* 111 N. J. L. 596, and states it "likewise holds the New Jersey statute unconstitutional". The reason therefor can readily be seen from that part of the decision (on pp. 602, 3) reading:

> "* * * the statute neither purports to be directed towards an emergency nor limits the application of the enactment either in field or in time. Its purview is absolute, final and permanent * * *."

The other three cases cited were decided before the *Blaisdell* case.

On the other hand we note since the *Blaisdell* decision an increasing disposition on the part of State Courts to uphold emergency legislation for the relief of mortgagors. This trend is evidenced by decisions in

Alabama—*Mutual Bldg. & L. Ass'n* v. *Moore* (1936), 169 So. (Ala. S. Ct.) 1;
Arkansas—*Sewer Imp. District No. 1 of Wynne* v. *Delinquent Lands* (1934), 188 Ark. 738;
Iowa—*Connecticut General Life Ins. Co.* v. *Roth* (1934), 218 Ia. 251;
Craig v. *Waggoner* (1934), 218 Ia. 876;
Tusha v. *Eberhart* (1934), 218 Ia. 1065;

Louisiana—*Metropolitan Life Ins. Co.* v. *Morris* (1935), 181 La. 277;
Michigan—*Daugherty* v. *Reading* (1934), 266 Mich. 514.

POINT V.

The instrument sued upon is very obviously a collateral bond and not a primary obligation as claimed by appellant.

It is not apparent as to how this question can properly come before this Court on this appeal. However, since the appellant has elected to raise the point (Point I of Appellant's Brief) the appellee answers it here.

At the time that the original bond and mortgage described in paragraphs I and II (R. 9) of the amended complaint were assigned to the appellant's assignor, there was executed and delivered by John H. Hanan, Addison G. Hanan and Herbert W. Hanan to the appellant's said assignor the collateral bond in question and also the extension agreement referred to in paragraph V of the said amended complaint (R. 10). All the instruments were delivered simultaneously and it was a single transaction.

The appellant contends "The loan made by the appellant's guardians to defendant's testator is evidenced by a written instrument attached to the complaint, Exhibit A (Record, p. 12)." (Appellant's Brief, p. 6.)

The instrument itself shows, to the contrary, that the loan was not made to the "defendant's testator". There is no recital in said bond of an existing indebtedness on the part of the obligors. The preamble recites that John H. Hanan, Herbert W. Hanan and Addison G. Hanan "*are held and firmly bound* unto Martin H. Taylor and Leander H. LaChance as General Guardians" of the persons and estates of Marian Stewart and Jean

Stewart, infants, in the sum of Sixty thousand ($60,000) Dollars.

The absence of a recital in the preamble that the obligors are *indebted* to the obligees, in itself makes the instrument different from the usual bond. It states that the obligors are *bound*. Why did they bind themselves in the sum of Sixty thousand ($60,000) Dollars? The recitals following the preamble clearly give the reason, viz.:

The first *Whereas* (R. 13) recites the 1907 bond for One hundred eighteen thousand ($118,000) Dollars made by John H. Hanan and John H. Hanan Realty Company to Louise L. Williams and others, as trustees, and the mortgage given as security therefor. The second *Whereas* (R. 13) recites the assignment of said bond and mortgage to John H. Hanan and that John H. Hanan "is *about to assign* the said bond and mortgage to the obligee above named". The third *Whereas* (R. 13 and 14) recites that "*John H. Hanan Realty Company* has executed and delivered to the obligee above named an extension agreement bearing even date herewith wherein and whereby" the said John H. Hanan Realty Company agrees to pay to said obligee the principal sum of Sixty thousand ($60,000) Dollars "being the balance unpaid upon the said bond and mortgage" on August 17th, 1923, with interest.

The last *Whereas* (R. 14) recites that "to induce the said obligee to advance the said sum of Sixty thousand ($60,000) Dollars, *upon the said bond and mortgage*, as aforesaid, and to execute and deliver the said extension agreement, the said obligors hath agreed to make, execute and deliver this bond as *further and additional security* for the payment of the said above-mentioned bond and mortgage".

The said recitals clearly show that the transaction was a mortgage loan made by taking an assignment of

an existing mortgage and extending it at the new amount for three years instead of satisfying the old mortgage and making a new mortgage. This is a practice provided for by statute (Real Property Law of New York, Section 275) and familiar to all persons dealing in mortgages. It is done to minimize recording taxes. In this case Three hundred ($300) Dollars in mortgage taxes was saved by assigning the mortgage instead of executing a new one.

Aside from these recitals, the condition of the instrument, expressly set forth in its concluding paragraph, shows the nature of the obligation, to wit:

> "NOW THEREFORE THE CONDITION OF THIS OBLIGATION IS SUCH, that if the parties bound to pay the moneys secured by said bond and mortgage, or the above-bounden obligors, their respective legal representatives or assigns shall well and truly pay, or cause to be paid, to the said obligee, their successors, legal representatives or assigns, the just and full sum of sixty thousand dollars ($60,000), together with all interest thereon, as the same shall become due and payable according to the terms and conditions of the aforesaid bond and mortgage and extension agreement; and if the said obligors, their respective legal representatives and assigns shall, at all times hereafter, hold, indemnify and save harmless the said obligee, their successors, legal representatives and assigns, from and against all loss, damages, costs, expenses, suits, actions, claims and demands whatsoever, which they may or might otherwise, at any time hereafter, sustain, suffer, be liable to or obliged to pay *under or by reason of any default in any of the terms, provisions, covenants or conditions of the aforesaid bond and mortgage or any extension thereof,* then this obligation to be void, otherwise to remain in full force and virtue."

It will be observed that the liability of the obligors depended upon the failure of the "parties bound to pay" (the owner of the mortgaged premises) to comply with the conditions of the original bond, mortgage and extension agreement.

There is no recital in the bond to the effect that the obligees loaned or were about to lend to the obligors the sum of Sixty thousand ($60,000) Dollars. If the transaction was a loan to the obligors it is reasonable to assume a recital to that effect would have been incorporated in the bond. Appellant attempts to spell out a loan to the obligors because the recital in the last *Whereas* clause states in part that it was made in order to induce the obligee to advance Sixty thousand ($60,000) Dollars upon the bond and mortgage and extension agreement. It does not say that the advance was to be made *to the obligors,* and the instrument must be read in its entirety to ascertain the meaning and intent of the parties. When so read no such inference can fairly be drawn from it.

The language of this bond, "Exhibit A", was not that of layman. It is plainly the work of counsel, who, it must be assumed, completely reduced his client's transaction to writing. It cannot be presumed that he overlooked inserting an express provision that the obligors borrowed Sixty thousand ($60,000) Dollars from the obligees and were to repay it; and that John H. Hanan, one of the obligees was giving a bond and mortgage of Sixty thousand ($60,000) Dollars as collateral for the payment of such a loan. If it was a loan to the obligors, why did she use the printed form of a Collateral Bond instead of an ordinary Bond form?

The record does not disclose what is disclosed by the photostatic copy of this bond attached to the amended complaint, and that is that this bond is on the usual printed legal form of collateral bond supplied by sta-

tioners and at the extreme upper left hand corner thereof there is printed the Index title "Collateral bond".

If the original bond and mortgage were given as collateral security this bond would not have recited that John H. Hanan was "about to assign" the bond and mortgage to the obligee. The transaction was too important to believe that some simple provision would not have been inserted in the bond clearly and explicitly showing that the bond and mortgage were given as collateral security only. The obvious reason such provision was not inserted is that such was not the transaction. The failure of the bond to contain such a provision, its verbiage and the fact that the transaction was with General Guardians who could not legally invest their ward's funds in a personal loan, conclusively show that this "Exhibit A" now sued upon was taken as a collateral bond guaranteeing payment of the 1907 bond and mortgage being then assigned to appellant's guardians.

Counsel for appellant in attempting to show that "Exhibit A" is a primary obligation argues the general rule that the character of a promise is not to be determined with reference to the language employed and cites *Clark* v. *Howard,* 150 N. Y. 232 (239); *Matter of People,* 264 N. Y. 88, and 28 Corpus Juris, page 886, Section 1. These citations simply indicate that a document may be so worded that it may sound like a guaranty or indemnity agreement, but in fact may be something different. But such is not the case here.

He argues that the transaction was "not a sale of the 1907 bond and mortgage with a guaranty" (Appellant's Brief, p. 7). The fact is *it was just that.* This same point was raised by this appellant before the

New York Court of Appeals. At that time the appellee pointed out to that Court that the bond in question contained substantially the same language as the bond involved in the case of *City Bank Farmers Trust Co.* v. *Ardlea,* 267 N. Y. 225, in which that Court had held the similar bond to be a guaranty and, therefore, within the Mortgage Moratorium laws.

It would appear that the appellant has turned face about on this point since her foreclosure action because in the extension agreement of November 20, 1926, a copy of which was attached to the moving papers on the appellant's motion for summary judgment in said previous action there is this recital:

> "Witnesseth, that the party of the first part, the holder of a certain bond made by John H. Hanan and John H. Hanan Realty Corporation, dated January 10, 1907, and also of a *certain collateral bond* made by John H. Hanan, Herbert W. Hanan and Addison G. Hanan, *dated August 9, 1920,* both of said bonds being secured by a mortgage bearing date January 10, 1907, * * *." (Italics ours.)

And in the memorandum submitted to the Court by the appellant on her said motion there is a statement by her attorney:

> "The said Herbert W. Hanan originally signed a *collateral bond* in connection with plaintiff's mortgage. In 1926, however when the same was extended for a further period of 5 years, said Herbert W. Hanan joined with the John H. Hanan Realty Company in the execution of the extension agreement. It was his intention *to become liable personally* for the repayment of the mortgage indebtedness and it was on the strength of his signing said agreement that the plaintiff extended the loan." (Italics ours.)

In spite of those previous admissions the appellant

now tries to maintain that the original mortgage loan was made to Herbert W. Hanan. Thus does she change her argument to suit her predicament.

This question as to whether the instrument was on one hand a primary obligation or on the other hand a collateral bond or guaranty was gone into at great length in the lower courts and it would appear from the unanimous affirmances of the judgment in favor of the appellee that the question has already been finally and definitely adjudicated against the appellant.

The appellee there stressed that the instrument in question fell within the category specified in Section 1077-b of the Civil Practice Act; that it was a "collateral bond"; that it was a "guaranty" of an "obligation secured by such mortgage"; that it was made "simultaneously" with the foreclosed mortgage, as that word had been construed by the Court of Appeals in *Klinke* v. *Samuels*, 264 N. Y. 144, *City Bank* v. *Ardlea*, 267 N. Y. 224, and *Kramer* v. *Relgov*, 268 N. Y. 592.

Since all the lower courts unanimously found that the "Mortgage Moratorium laws apply" it must follow that they conclusively found the instrument in question to be one described in said Section 1077-b of the Civil Practice Act, the constitutionality of which is not questioned here.

POINT VI.

The appeal herein should be dismissed or, in the alternative, the judgment of the Supreme Court of the State of New York should be sustained.

Respectfully submitted,

JAMES S. BROWN, JR.,
Counsel for Appellee,
66 Court Street,
Brooklyn, N. Y.

ANTHONY F. TUOZZO,
WILLIAM GILLIGAN,
Of Counsel for Appellee.

APPENDIX.

Chapter 793.

AN ACT to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

SECTION 2. The civil practice act is hereby amended by inserting therein new sections, to be sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f and ten hundred seventy-seven-g, to read as follows:

SECTION 1077-a. FORECLOSURE FOR PRINCIPAL DEFAULTS SUSPENDED.—During the period of the emergency

as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

SECTION 1077-b. ACTIONS ON BONDS FOR PRINCIPAL DEFAULTS SUSPENDED.—No action shall be maintainable or judgment shall be entered during such emergency, upon any loan, indebtedness, bond, extension agreement, collateral bond, or other evidence of indebtedness or liability, whether or not such indebtedness or liability shall have been thereafter reduced, extended, or modified, if the indebtedness originated or was originally contracted for simultaneously with such mortgage and is secured solely by such mortgage, or upon any guaranty of payment of the principal or installment of principal of any mortgage within the scope of section ten hundred seventy-seven-a or upon a guaranty of any obligation secured by such mortgage, so long as no action or proceeding shall be maintainable to foreclose such mortgage. No action shall be maintainable or judgment

be entered during such emergency upon any guaranty of payment of any share or part of any bond and/or mortgage or group of bonds and/or mortgages represented by a certificate, bond, debenture or other instrument, nor upon any note, bond, debenture or other instrument being part of a series issued against, or secured by the deposit of a bond and/or mortgage or a group of bonds and/or mortgages so long as interest at the rate prescribed shall be paid upon any such certificate, note, bond, debenture or other instrument. The liability of any endorser, guarantor of, or surety for any such liability shall not be discharged by reason of the failure of the holder to demand payment of any such indebtedness or liability, or by reason of any failure to give notice of non-payment, or by reason of any failure to bring any action or proceeding thereon during the emergency.

SECTION 1077-c. NOTICE OF APPLICATION.—Notwithstanding the foregoing provisions, any person who would otherwise have the right to foreclose a mortgage, shall have the right to make an application to any court in which such foreclosure action might be brought upon eight days notice, served personally, or in such manner as the court may direct to the last record owner of the mortgaged property, and if upon such application it shall appear to the satisfaction of the court that the mortgaged property during the six months prior to the application shall have produced a surplus over and above the taxes, interest and all other carrying charges, then the court may make an order directing the payment of such surplus or such part thereof as the court may determine to the mortgagee to apply toward the reduction of any past due principal. In the event of default in making of such payment for thirty days after service of a copy thereof with notice of entry thereof, then and in such event the applicant may maintain an action to

foreclose such mortgage. In any such proceeding the court may enter an order permitting foreclosure without other proof if the owner of the property shall fail to make available for inspection by the mortgagee and the court all records and data available as to the income and disbursements, or if the owner shall fail to produce adequate records or data of income and disbursements. This section shall not apply to properties used or intended to be used for farming purposes or dwellings occupied by the owner or by the owner in conjunction with not more than one other family.

SECTION 1077-d. WAIVER AGAINST PUBLIC POLICY.—Any covenant or agreement or understanding in or in connection with or collateral to any mortgage whereby a mortgagor waives or agrees to waive the protection intended to be afforded to him by sections ten hundred seventy-seven-a and ten hundred and seventy-seven-b, shall be deemed to be void as against the public policy and be wholly unenforceable.

SECTION 1077-e. APPLICATION TO PENDING ACTIONS.—Sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-d shall apply to any action or proceeding heretofore instituted for the foreclosure of a mortgage within the scope of this act unless the same has proceeded to final judgment directing the sale of the mortgaged premises, and any such action shall be dismissed upon payment by any defendant to the plaintiff of taxable costs and the remedying of any default other than the payment of principal or any installment of principal within thirty days after this act takes effect, but otherwise such action or proceeding may continue.

SECTION 1077-f. STATUTE OF LIMITATIONS NOT TO RUN DURING EMERGENCY.—Any action or proceeding within

the scope of this act, which would have been maintainable at any time during the period of the emergency, shall not be barred by any provision of article two of the civil practice act during a period of one year after the termination of the emergency. This section shall not be construed to shorten the period within which any such action may be commenced.

SECTION 1077-g. MORTGAGES NOT AFFECTED.—The provision of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any obligations in connection with or secured by any such mortgages. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred thirty-four.

SECTION 3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part thereof.

SECTION 4. This act shall take effect immediately.